and sent back to his action on the original contract against the drawer, his customer or debtor.

This last remedy is always open to him, for it has been universally held that none of the transactions with respect to the forged paper amounts to a "payment" in the technical sense of the term.

THE RIGHT OF A THIRD PARTY TO SUE ON A CONTRACT.

The right of a third party to sue on a contract, made for his benefit but to which he was not a party, has been recognized so often and by so many jurisdictions, that it seems there must be some consistent principle on which to base it. The concensus of opinion of the textwriters, however, treats it as an anomaly. Certain well recognized transactions must be distinguished. Whenever property is delivered to one man with an obligation attached to the specific property conveyed or delivered, in favor of a third person, there is no difficulty in giving the latter a right to bring an action in his own name. The facts might show, either that the legal title was conveyed with an equitable obligation attached in favor of a *cestui que trust,* or that the legal title passed direct to the third party, by the transaction, and that the promisor became a bailee to deliver —as, for example, delivery of goods to a carrier in fulfillment of a contract to sell. In both of the above cases there is an obligation attached to the specific property conveyed. The right of action in the beneficiary is not based upon contract, but upon a property right. The same transaction creates a contract right in the promisee and a property right in the beneficiary. In the case of *Harrington* v. *Green,* 107 N. Y. Supp. 403 (Nov., 1907), the defendant received a check from the *promisee* for $372—$82.44 of which was for the plaintiff. No reasons were given to sustain the recovery allowed. Nor did the facts show whether the defendant was to pay the plaintiff out of the proceeds of the check. If such was the case, the defendant was clearly a trustee of an undivided moiety for the plaintiff.

The difficulty arises when the promisor receives property, with no obligations attached to the specific *res,* but upon a promise to pay out of general assets, a sum certain to a third party. The latter may or may not be the sole beneficiary— premiums are paid by an insured to an insurance company, which promises to pay a sum certain to a named beneficiary. A mortgagor conveys land to B, who promises to pay the debt

of the mortgage to the mortgagee. A corporation deposits money in a bank to meet the coupons on its bonds, and the bank promises to pay the coupon holders. A parent gives property—real or personal—*intervivos* or by will—to a son upon his promise to pay certain sums to the daughter. A retiring partner assigns his interest to the remaining partners, who promise to pay the debts of the partnership. A debtor conveys his business to B, who promises to pay the creditors—in none of the above cases has the beneficiary any property right in the specific *res* conveyed, because in every case the promise is to pay out of general assets. Nor can there be any recovery based upon the doctrine of consideration and special promise, because the consideration does not move from the plaintiff. There is neither an assignment of a chose in action, nor a novation. Yet the increasingly large number of decisions permitting the beneficiary to recover[1] show, that whatever may be the apparent technical difficulties, justice requires some remedy to be given to the beneficiary. "Fair expectations should not be disappointed."[2] An exhaustive search of the early common law authorities show, that formerly, such a transaction gave rise to a debt.[3] There is a *quid pro quo* and a promise to pay a sum certain. A contract between the plaintiff and the defendant was not necessary to sustain an action of debt.[4] The action of debt has been said to be obsolete. It seems that its usefulness is still required.

But there is no principle of the common law on which to base an action by the beneficiary, where there has been no *quid pro quo*, but only a special promise.

Two fathers, whose children have intermarried, promise to each other to pay to the son a marriage portion. The son attempts to enforce the promises in his own name.[5] He has suffered no detriment, nor is there a debt. A doctrine permitting a recovery in such a case, is an anomaly. If the line is to be drawn somewhere, this seems to be the place.

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[1] The decisions for and against recovery are exhaustively treated in an article by Mr. Samuel Williston, entitled "Contracts for the Benefit of Third Persons," in XV Harvard Law Review, 767, 1902.

[2] "Law: Its Origin, Growth and Function," by James C. Carter, at bottom of page 18.

[3] See articles by Mr. Crawford D. Hening, entitled "The Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary," in American Law Register, Vol. 52, p. 779; Vol. 53, p. 112, and Vol. 56, p. 73.

[4] *Starkey* v. *Mill*, Styles 296 (1651).

[5] *Tweddle* v. *Atkinson*, 1 B. & S. 393 (1861).